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No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, *et al.*,
Petitioners,

vs.

ASH GROVE CEMENT COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Is an absent member of a class certified under Rule 23, Federal Rules of Civil Procedure, a "party" within the meaning of 28 U.S.C. § 455(b)(4) such that district and circuit judges, members of the Judicial Panel on Multidistrict Litigation, and Justices of the Supreme Court must recuse themselves if they or their spouses own stock of any absent class member?

2. Is a district judge's recusal immediately appealable to the Court of Appeals pursuant to either 28 U.S.C. § 1292(b) or the collateral order doctrine under 28 U.S.C. § 1291 where the district judge had presided in a complex multidistrict class action for almost five years, substantial time and effort would be required to familiarize a new judge with the litigation, and the sole basis for recusal was that the district judge's spouse had inherited stock in an absent class member?

PARTIES TO THE PROCEEDING

Petitioners are named plaintiffs in *In re Cement and Concrete Antitrust Litigation,* MDL Docket No. 296, a multidistrict class action currently pending in the United States District Court for the District of Arizona, and are listed in note 1, *infra.* Respondents are defendants below and are listed in note 2, *infra.*

Petitioners recognize that compliance with Supreme Court Rules 21 and 28 in class actions is ordinarily accomplished by listing only the named representative parties. *E.g., Weyerhaeuser Co.* v. *Lyman Lamb Co.,* No. 81-1618 and *Georgia-Pacific Corp.* v. *Lyman Lamb Co.,* No. 81-1619, ____ U.S. ____, 102 S.Ct. 2232 (1982), *granting cert. sub nom. In re Plywood Antitrust Litigation,* 655 F.2d 627 (5th Cir. 1981). The district court Order in this case, however, held that all 210,235 putative class members are "parties" for purposes of recusal under 28 U.S.C. § 455(b)(4), thus compelling petitioners to identify all class members as "parties." *In re Cement and Concrete Antitrust Litigation,* 515 F. Supp. 1076, 1079-80 (D. Ariz. 1981).

In order to avoid listing 210,235 "parties" in this printed petition, petitioners are filing concurrently herewith a "Motion for Relief from Compliance with Certain Provisions of Supreme Court Rules 19.3, 21.1(b), 28.1 and 28.3" so that petitioners might obtain leave to lodge with the Clerk of the Court only one copy of this list and serve this Petition on only the named parties below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on January 27, 1982, as modified April 15, 1982.

OPINIONS BELOW

The opinion filed May 26, 1981, by Chief District Judge C. A. Muecke is reported at 515 F. Supp. 1076 (D. Ariz. 1981), and is reprinted as Appendix B hereto. The opinion filed January 27, 1982, by the United States Court of Appeals for the Ninth Circuit, as amended on denial of rehearing and rehearing en banc on April 15, 1982, is reported at 673 F.2d 1020 (9th Cir. 1982), and is reprinted as Appendices A and G hereto.

JURISDICTION OF THIS COURT

The Order of the Court of Appeals was entered on October 30, 1981 (Appendix D hereto), an amended dissent filed on November 19, 1981 (Appendix E hereto), and an Opinion

issued on January 27, 1982 (Appendix A hereto). On February 3, 1982, petitioners filed a timely petition for rehearing and suggestion for rehearing en banc, which was denied April 15, 1982 (Appendix G hereto). On June 7, 1982, Justice Rehnquist issued an Order granting petitioners an extension of time in which to file a petition for a writ of certiorari until August 15, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes involved are 28 U.S.C. §§ 455, 1291 and 1292(b), which are reprinted as Appendix I hereto.

STATEMENT OF THE CASE

Beginning in September 1976, petitioners[1] brought a total of 32 separate actions in 12 different district courts, individually and as class representatives, seeking monetary and injunctive

[1] Petitioners and the plaintiffs below are: the States of Alabama, Arizona, California, Colorado, Florida, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, New Mexico, Oregon, Texas and Utah; Rubenstein Development Company and Harry Rubenstein; Bill Carson d/b/a Bill Carson Construction and Bill Carson Construction Co., Inc.; Leavell Company; James I. Barnes Construction Co. and James I. Barnes Construction Co., Inc.; William P. Jungelaus; Buck Brown Contracting Company, Inc.; Hechinger Company; Katterjohn Concrete Products of Owensboro, Kentucky, Inc.; The Sta-Dri Company; York Concrete Co. and York Concrete, Inc.; Sea Foamed of San Diego and Sea Foamed of Arizona; Vincent S. Perry and Ellis F. Hendricks, individually and d/b/a Perry and Hendricks; Estes Homes; Blankenship Builders, Inc. and Blankenship Construction Co.; Wooldridge Construction Co.; John Talley and John Talley Construction, Inc.; Picou's Builders Supply, Inc.; City of Austin, Texas; Northern Materials, Inc.; Smith & Green Corp., Allen R. Smith and Raymond Green; Colorado Concrete Mfg. Co.; Walter K. Laursen d/b/a Thriftway Lumber and Thriftway Lumber Company; and Edward W. Bergquist, as Trustee in Bankruptcy for Western Concrete Products Corp.

relief from respondents and other defendants[2] for an alleged conspiracy to fix, stabilize and maintain the price of cement and cement-containing products throughout the United States in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. The jurisdiction of the district courts was based upon 28 U.S.C §§ 1331 and 1337 and sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. On September 12, 1977, the Judicial Panel on Multidistrict Litigation transferred certain of these actions to the United States District Court for the District of Arizona and assigned them to Chief Judge C. A. Muecke for coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407. *In re Cement and Concrete Antitrust Litigation,* 437 F. Supp. 750 (J.P.M.D.L. 1977). *See also In re Cement and Concrete Antitrust Litigation,* 465 F. Supp. 1299 (J.P.M.D.L. 1979).

Following extensive discovery and voluminous briefing, Judge Muecke certified that these actions should proceed as class actions pursuant to Rule 23, Federal Rules of Civil Procedure. *In re Cement and Concrete Antitrust Litigation,* 1979-1 CCH Trade Cases ¶62,502 (D. Ariz. 1979). The parties then undertook further discovery to compile from defendants' customer lists the names and addresses of 210,235 putative class members. 673 F.2d, at 1022. Using this list for mailed notice and also using supplementary notice by publication, the putative class members were advised pursuant to Rule 23(c)(2), Federal Rules of Civil Procedure, of the pendency of this

[2] Respondents and/or defendants below are: Alamo Cement Corp.; Alpha Portland Industries, Inc.; Arkansas Cement Corp.; Ash Grove Cement Co.; Capitol Aggregates, Inc.; Centex Corp.; Centex Cement Corp.; Citadel Cement Corp.; Columbia Cement Corp.; Coplay Cement Mfg. Co.; Cyprus Hawaiian Cement Corp.; Dundee Cement Co.; Filtrol Corp.; General Portland, Inc.; Giant Portland Cement Co.; Ideal Basic Industries, Inc.; Kaiser Cement Corp.; Keystone Portland Cement Co.; Lehigh Portland Cement Co.; Lone Star Industries, Inc.; Louisville Cement Co.; Marquette Co.; Martin-Marietta Corp.; Medusa Corp.; Missouri Portland Cement Co.; Monarch Cement Co.; Monolith Portland Cement Co.; National Cement Co., Inc.; National Gypsum Co.; Nevada Cement Co.; OKC Corporation; Oregon Portland Cement Co.; Portland Cement Association; Portland Cement Co. of Utah; Santee Portland Cement Corp.; The Flintkote Co.; United States Steel Corp.; Valley Cement Industries, Inc.; Whitehall Cement Mfg. Co.; and Wyandotte Cement Inc. Pursuant to Supreme Court Rule 28.1, a listing of all parent companies, subsidiaries, and affiliates of the various respondents known to petitioners is set forth in Appendix J hereto.

litigation and of their right to be excluded from the class.[3] The deadline for putative class members to seek exclusion from the class expired on December 31, 1980, and, more than four years after the litigation was first commenced, the membership in the class was finally fixed.

On February 23, 1981, respondents filed a motion asking Chief Judge Muecke to recuse himself under 28 U.S.C. § 455(b)(4). CA9 App. Ex. 14. The motion was based on the fact that Chief Judge Muecke's wife had inherited as her sole and separate property stock in seven absent class members. 515 F. Supp., at 1080, 1082-83. The motion argued that Judge Muecke was required to recuse himself no matter how insignificant his wife's stock holdings because (1) absent class members are "parties" to the litigation within the meaning of 28 U.S.C. § 455(b)(4), and (2) his wife's stock ownership was "a financial interest in the subject matter in controversy" under section 455(b)(4).

Based solely on his conclusion that absent class members are parties,[4] Chief Judge Muecke granted respondents' motion and recused himself on May 26, 1981. Chief Judge Muecke noted that any conceivable financial benefit to his wife was so insignificant that it could not "seriously be contended that [his] continuation in this matter creates the appearance of impropriety," 515 F. Supp., at 1081, and lamented over the waste-

[3] Exhibit 6 in Appendix to Petition for Permission to Appeal From the United States District Court for the District of Arizona Pursuant to Title 28 U.S.C. § 1292(b) and Brief of Petitioner (hereinafter "CA9 App. Ex. ").

[4] Regarding respondents' alternative basis for recusal, Chief Judge Muecke found "the term 'subject matter in controversy' to be inherently vague," but noted that his "conclusion that the 'parties' provision of § 455 is applicable to the present case makes the resolution of the 'subject matter in controversy' issue unnecessary." 515 F. Supp., at 1080.

fulness and inefficiency of transferring the litigation to a new judge.[5] Nonetheless, he interpreted section 455(b)(4) as imposing a mandatory requirement of recusal based upon his wife's stock ownership in absent class members:

> I have concluded that I must recuse myself, not because I feel a sense of conflict, and not because I feel that to continue would create the appearance of impropriety. I have concluded that I must recuse myself for the sole reason that the law, as written, says I must.

515 F. Supp., at 1078. On June 3, 1981, Chief Judge Muecke amended his May 26, 1981, Opinion, found that his recusal "involve[d] a controlling question of law as to which there is substantial ground for difference of opinion and [that] an immediate appeal ... may materially advance the ultimate determination of the litigation," and certified his decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Appendix C hereto.

Petitioners sought review in the Ninth Circuit on three separate jurisdictional grounds: (1) interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (No. 81-5481); (2) appeal of a collateral order pursuant to 28 U.S.C. § 1291 and *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (No. 81-8079); and (3) writ of mandamus pursuant to 28 U.S.C. § 1651 (No. 81-7465). The majority of the Ninth Circuit panel dismissed the section 1291 appeal and denied the petition to appeal under section 1292(b), but set the application for a writ of mandamus for argument before a different panel.

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[5] Chief Judge Muecke commented:

> Compare my wife's financial interest in this litigation with the burden of applying § 455. As I have said, this case is into its sixth year. This Court has entered 75 pretrial orders, decided countless motions, and retains a working knowledge of where the suit has been and where it is headed. Such knowledge is crucial to competent case management. To transfer five and one-half years of work and paper to a new judge seems unfair, not only to the parties, but to the unlucky transferee and will in all likelihood be the occasion for delay. Decisions which might routinely be disposed of by me may well take a new judge longer until he has the opportunity to become acquainted with the case.

515 F. Supp., at 1081 (footnote omitted).

Writing for the majority, Judge Wallace expressly rejected contrary decisions in the Third and Fifth Circuits, and narrowly interpreted the phrase "controlling question of law" in section 1292(b) as being limited to those issues which "could materially affect the outcome of the litigation in the district court." 673 F.2d, at 1026-1027, *citing Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 755 (3rd Cir.), *cert. denied* 419 U.S. 885 (1974); *Hadjipateras* v. *Pacifica, S.A.*, 290 F.2d 697, 702-03 (5th Cir. 1961). The majority then held that Chief Judge Muecke's interpretation of section 455(b)(4) was "not a 'controlling question of law,' and therefore the jurisdictional prerequisites for section 1292(b) review ha[d] not been met." 673 F.2d, at 1026. Judge Wallace ignored decisions from other circuits where section 1292(b) appeals of recusal orders had been permitted. *E.g., In re Virginia Electric and Power Co.*, 539 F.2d 357 (4th Cir. 1976), *cited at* 673 F.2d, at 1030 (Boochever, J., dissenting).

In also dismissing the section 1291 appeal, the majority recognized that the *Cohen* doctrine applied to "orders which finally determine 'claims of right,' " 673 F.2d, at 1024, but held that petitioners had no claim of right "in not having a judge disqualify himself unnecessarily when a recusal order would so disrupt the course of the litigation as to cause substantial delay." *Id.*, at 1025. Although he noted that "five of the seven members of the [Judicial] Panel [on Multidistrict Litigation] own stock in putative class members," and that under Chief Judge Muecke's ruling "the Panel [could not] act to assign the cases to a new judge or remand them to the districts where they were originally filed," *id.*, at 1024, Judge Wallace reasoned that this stock ownership did not present an obstacle to Panel action because 28 U.S.C. § 455 did not apply to members of the Panel. 673 F.2d, at 1024-25.

Judge Boochever dissented. He argued that the Ninth Circuit should follow the rule applied in the Third and Fifth Circuits and interpret "controlling question of law" to include " 'procedural determination[s] that may importantly affect the conduct of an action,' " 673 F.2d, at 1029, *quoting In re Duplan Corp.*, 591 F.2d 139, 148 n.11 (2nd Cir. 1978) (Friendly, J.), and not simply those issues which actually determine the

outcome of a suit. Applying this standard, Judge Boochever concluded that the Circuit Court should, in the exercise of its discretion, review the recusal order under section 1292(b). 673 F.2d, at 1029-30. Judge Boochever also disagreed with the majority's dismissal of the section 1291 appeal, 673 F.2d, at 1030-31, and its conclusion that 28 U.S.C. § 455 did not apply to members of the Judicial Panel on Multidistrict Litigation. 673 F.2d, at 1031 n.6. Judge Boochever agreed, however, with the majority's decision to set the application for a writ of mandamus for oral argument.

On January 4, 1982, a separate panel of the Ninth Circuit heard argument on petitioners' application for a writ of mandamus, but no decision has yet been rendered. The Judicial Panel on Multidistrict Litigation has refused to appoint a new district judge to replace Chief Judge Muecke until after the Ninth Circuit ruling (Appendix H hereto) and, if it follows the reasoning of Chief Judge Muecke and Judge Boochever, it may be incapable of assigning a new judge.[6] Thus, some 15 months have now passed since Judge Muecke recused himself; no new judge has been appointed to replace him; there are no immediate prospects for the appointment of a new judge; and serious questions exist over whether the Panel can act to appoint a new judge.

REASONS WHY THE WRIT SHOULD BE GRANTED

I

THIS COURT SHOULD NOT INTERPRET 28 U.S.C. § 455(b)(4) IN A MANNER WHICH WOULD PREVENT CONSIDERATION OF THE IMPORTANT ISSUES PRESENTED BY THIS PETITION

The issues presented by this petition are important ones which need to be decided by this Court in order to resolve the various conflicts among the Circuits. Yet, if Chief Judge

[6] Under 28 U.S.C. § 1407(d), the concurrence of four Panel members is necessary "to any action by the Panel." The 1982 financial disclosure statements of Judges Pointer, Caffrey, Harper and Daugherty show stock holdings in entities on the Master Class List. Thus, there are only three Panel members who would not own stock "in a party to the proceeding" under Chief Judge Muecke's ruling.

Muecke's decision is correct and a single share of stock in an absent class member is a disqualifying interest, this Court would not be able to grant or deny this petition or even decide the simple procedural motion for relief from the Rules being filed concurrently herewith. Under 28 U.S.C. § 1, this Court must have a quorum of six Justices, and lower court judgments must be affirmed pursuant to 28 U.S.C. § 2109 when a quorum cannot be convened. Applying Chief Judge Muecke's ruling would result in recusal of five Justices, thereby defeating the quorum and preventing consideration of this petition.[7]

To be able to consider this petition, this Court must reject Chief Judge Muecke's erroneous interpretation of section 455(b)(4). Absent class members should not be considered to be parties under section 455(b)(4) because "general law does not treat class members and parties in an identical fashion," 515 F. Supp., at 1079, and Congress should not be presumed to have upset this general law without a clear expression of intent. No such intent has been evidenced. Nor should stock ownership in an absent class member be considered to be "a financial interest in the subject matter in controversy" under section 455(b)(4) because that provision applies only to "direct ownership." *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794, 796 (10th Cir. 1980). The most that can be said for stock ownership in an absent class member is that it is an indirect "other interest" to be judged under the substantiality standard of section 455(b)(4) rather than the *per se* rule applied by Chief Judge Muecke.

Resolution of the issues presented by Chief Judge Muecke's recusal decision is important for other reasons. If that decision is correct, then this Court needs to amend Supreme Court Rules 21, 28.1 and 28.3 to bring them into compliance

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[7] The 1982 financial disclosure statements of Chief Justice Burger, and Justices Blackmun, Powell, Rehnquist and O'Connor include stock holdings in corporations which appear on the Master Class List. Justice O'Connor also appears to be disqualified under 28 U.S.C. § 455(b)(5)(ii) because of her spouse's former membership in a law firm representing a number of the respondents and defendants in the district court.

Justice Rehnquist has previously ruled on motions for extensions of time in this litigation without mentioning whether his stock ownership in absent class members requires recusal pursuant to section 455(b)(4).

with section 455(b)(4).[8] With the increasing prevalence of class actions, the issue will be a recurring one. Indeed, this is actually the second time that this issue has been before this Court with the same parties.[9]

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[8] The normal practice in class actions under Supreme Court Rules 21, 28.1 and 28.3 is simply to list the representative parties. *Mead Corp.* v. *Adams Extract Co.*, ____ U.S. ____, 102 S. Ct. 1994 (1982), *denying cert. sub nom. In re Corrugated Container Grand Jury*, 659 F.2d 1330 (5th Cir. 1981), and *Weyerhaeuser Co.* v. *Lyman Lamb Co.*, No. 81-1618, and *Georgia-Pacific Corp.* v. *Lyman Lamb Co.*, No. 81-1619, ____U.S.____, 102 S. Ct. 2232 (1982), *granting cert. sub nom. In re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981), were all cases like the present one involving nationwide classes; yet in none of those cases did this Court have before it a list of all class members.

If Judge Muecke's ruling is correct, it is possible that this Court did not have a quorum to deny certiorari in *Mead* or to grant certiorari in *Weyerhaeuser* and *Georgia-Pacific*, and this Court certainly should not have acted upon those petitions without at least having the lists of the class members in those cases.

[9] *Alpha Portland Industries, Inc.* v. *California*, ____U.S.____, 102 S. Ct. 17 (1981), *dismissing petition for cert. pursuant to Rule 53.2(c) sub nom. In re Grand Jury Proceedings at Chattanooga, Tennessee*, 649 F.2d 387 (6th Cir. 1981), was a related case involving the same parties who are now before this Court, and also presented the issue whether 28 U.S.C. § 455(b)(4) requires the recusal of Justices of this Court because of ownership of stock in absent class members.

In *Alpha*, various cement manufacturers who are also respondents in this case sought review of the Sixth Circuit decision transferring certain grand jury materials to Chief Judge Muecke. Their petition for a writ of certiorari in *Alpha* was before this Court at about the same time that Chief Judge Muecke entered his recusal order and since Chief Judge Muecke's decision would also have required recusal of the Justices of this Court who owned stock in absent class members, the petitioners in this case felt obligated as officers of the Court to bring to this Court's attention the possibility that recusal might be required if Chief Judge Muecke was correct in his decision that absent class members are "parties" within the meaning of section 455(b)(4). *See* July 23, 1981, letter from Peter K. Shack to Alexander L. Stevas regarding *Alpha Portland Industries, Inc.* v. *California*, No. 80-2062, reprinted as Appendix K hereto.

When confronted with the possibility that this Court might actually be required to consider the correctness of Chief Judge Muecke's decision, the cement manufacturers followed the highly unusual course under Supreme Court Rule 53.2(c) of unilaterally dismissing their petition for a writ of certiorari and tendering to the petitioners in this case the full amount of their damages and costs in this Court in opposing that petition. Any other action by the cement manufacturers would have resulted in this Court's considering (in the *Alpha* case) the correctness of Chief Judge Muecke's decision at least a year before it is decided here.

This Court should therefore reject Chief Judge Muecke's interpretation of section 455(b)(4) and consider the important issues presented by this petition.

II

THE NINTH CIRCUIT'S INTERPRETATION OF 28 U.S.C. § 1292(b) CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS

A. The Ninth Circuit's Refusal to Entertain Section 1292(b) Appeals of Recusal Decisions Conflicts with the Rule Adopted by Four Other Circuit Courts.

The Ninth Circuit now stands alone in prohibiting section 1292(b) appeals of decisions by district judges recusing themselves. The Ninth Circuit holding is directly contrary to decisions by the Courts of Appeals in the Third, Fourth, Sixth and Tenth Circuits, all of which have permitted section 1292(b) review of district court recusal orders. *Haas* v. *Pittsburgh National Bank*, 627 F.2d 677 (3rd Cir. 1980); *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir. 1980); *In re Virginia Electric & Power Company, supra; Kelly* v. *Metropolitan County Board of Education*, 479 F.2d 810 (6th Cir. 1973).

While certain recusal decisions perhaps should not be reviewed under Section 1292(b), that is no justification for the Ninth Circuit's blanket rule prohibiting appellate review in all cases. As the Ninth Circuit itself recognized in this case, "judicial resources might be saved" by permitting appellate review in certain situations. 673 F.2d, at 1027. There will, for example, be cases where recusal turns solely upon an important question of law having far-reaching implications, such as "the important question of the applicability of 28 U.S.C. § 455(b)(4) to class actions." *Id.* Congress intended section 1292(b) to be a means of expediting lawsuits while still avoiding a proliferation of inappropriate appeals. Sen. Rep. No. 2434, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S. Code Cong. and Admin. News at 5255-57; *Katz* v. *Carte*

Blanche Corp., supra, 496 F.2d, at 753-56. The Ninth Circuit's narrow and unique interpretation is contrary to the manifest purpose of section 1292(b).

The Ninth Circuit rule that recusal orders are not appealable under section 1292(b) conflicts with both the Congressional purpose underlying that statute and the decisions of other circuits. These conflicts should be resolved by this Court.

B. The Ninth Circuit's Limitation of Section 1292(b) Appeals to Outcome-Determinative Issues Conflicts with the Broader Interpretation Applied by Other Circuit Courts.

The Ninth Circuit interpreted section 1292(b) to apply only to issues which "could materially affect the outcome of litigation," 673 F.2d, at 1026, and expressly rejected the broader view followed in at least the Third and Fifth Circuits that section 1292(b) is available for interlocutory appeal of legal issues "the resolution of which may appreciably shorten the time, effort, or expense of conducting a lawsuit." *Id.,* at 1027, *citing Katz* v. *Carte Blanche Corp., supra,* 496 F.2d, at 755-56; *Hadjipateras* v. *Pacifica, S.A., supra,* 290 F.2d, at 702. In limiting interlocutory appellate review to legal issues which actually affect the outcome of a lawsuit rather than the broader test intended by Congress,[10] and the rule followed in other circuits and advocated by the commentators,[11] the Ninth Circuit has misconstrued section 1292(b).

The outcome-determinative test adopted by the Ninth Circuit is too narrow a reading of section 1292(b). There is a wide variety of pretrial legal issues where interlocutory appellate review will materially advance or expedite the litigation although not affecting who wins or loses the suit. *E.g., Garner* v. *Wolfinbarger,* 433 F.2d 117 (5th Cir. 1970) (change of venue order appealable under section 1292(b)); *Schine* v. *Schine,* 367 F.2d 685 (2nd Cir. 1966) (severance appealable under section 1292(b)). Appellate review of such decisions

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[10] *See Katz* v. *Carte Blanche Corp., supra,* 496 F.2d, at 753-56.

[11] *E.g.,* Note, *Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b),* 88 Harv. L. Rev. 607 (1975), and other authorities cited at 673 F.2d, at 1029 (Boochever, J., dissenting).

would ordinarily not be available under either sections 1291 or 1651, and if section 1292(b) review is also foreclosed a substantial body of significant legal decisions will be developed solely by the district courts without any guidance by the appellate courts. What is required by section 1292(b) is that the question be one of law rather than of fact or discretion. *E.g., DeWitt* v. *American Stock Transfer Co.*, 440 F. Supp. 1084, 1088 (S.D.N.Y. 1977). The legal question must be "controlling" in the sense that it will have a significant impact on the future conduct of the proceedings. *E.g., Katz* v. *Carte Blanche Corp., supra.* Of course, a proliferation of interlocutory appeals can always be avoided because the Circuit Courts must "exercise . . . the discretion granted . . . by the statute, [to decide whether] . . . to accept jurisdiction." 673 F.2d, at 1026.

The Ninth Circuit's ruling conflicts with these objectives of section 1292(b) and the decisions of other Courts of Appeals. This Court should issue the writ of certiorari to resolve these conflicts

III

THE NINTH CIRCUIT HAS IMPROPERLY INTERPRETED AND APPLIED THE COLLATERAL ORDER DOCTRINE FOR APPEALS UNDER 28 U.S.C. § 1291

The Ninth Circuit refused to accept jurisdiction under 28 U.S.C. § 1291 even though it found that the district court's recusal decision was a "collateral order" falling within this Court's recent articulation of the rule of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), in *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 378 (1981).[12]

Relying on *Hampton* v. *City of Chicago*, 643 F.2d 478 (7th Cir. 1981), the Ninth Circuit concluded that section 1291 jurisdiction was lacking because petitioners had no "recognizable interest" or "claim of right" with which an erroneous

[12] "[W]e cannot disagree that an order granting recusal conclusively determines a disputed question, completely separate from the merits of the action, which, if not reviewed immediately, will be effectively unreviewable on appeal from final judgment." 673 F.2d, at 1023.

recusal could have interfered since Chief Judge Muecke's duties could be assumed by a replacement judge to be appointed by a four-member majority of the Judicial Panel on Multidistrict Litigation. However, the Ninth Circuit noted that "even the Court in *Hampton* suggested that [the preclusion under the recusal order of the appointment of a replacement judge] might satisfy the 'claim of right' requirement." 673 F.2d, at 1024, *citing Hampton's* reference to *In re Virginia Electric & Power Co., supra,* 643 F.2d, at 479 n.2.

The Ninth Circuit majority held that Judicial Panel members are not subject to the section 455 recusal provisions and, therefore, there is no impediment to the appointment of a new judge. However, there is an apparent conflict in such a holding between the Ninth Circuit and the Judicial Panel, which has refused to appoint a new judge until after a ruling on the merits of Chief Judge Muecke's recusal is issued. (Appendix H hereto.)

Judge Boochever's dissent recognized that "the reasons that would preclude a judge from adjudicating the merits of a case are equally relevant in determining whether a judge should participate in the reassignment of a case", 673 F.2d, at 1031 n.6, and suggested temporary appointments to the Judicial Panel in order to create a quorum. However, this also is precluded under Chief Judge Muecke's order since section 1407(d) places responsibility for Panel appointment on the Chief Justice, who also owns stock in an absent class member.[13] Accordingly, before he can act, the Chief Justice will have to determine that (1) he disagrees with Chief Judge Muecke, (2) appointing temporary Panel members is not within the scope of section 455, or (3) he is disqualified and his duties may be assumed by another Justice.[14]

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[13] The Chief Justice's 1982 Financial Disclosure Statement indicates he owns stock in 3M Corp., which has previously been established as having made a purchase qualifying it for class membership.

[14] Another effect of Chief Judge Muecke's Order would require the Clerk's office to do a complete recusal review based on all 210,235 putative class members in this litigation, and that all courts involved in all class actions complete a review of all class members even though a determination of the class may not be made until a substantial amount of the litigation (as here, four years) has been completed.

CONCLUSION

The petition for a writ of certiorari should be granted.

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